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IN THE

Supreme Court of the United States

October Term, 1966.

No. 299.

THOMAS DOWNIE,

Petitioner,

v.

UNITED STATES LINES CO.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

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OCTOBER TERM, 1966.

No. 299.

THOMAS DOWNIE,

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v.

UNITED STATES LINES CO.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

QUESTION PRESENTED.

In an action under the Jones Act, 46 U.S.C.A., § 688, for damages for negligence of the defendant the question is whether the prospective curtailment of the living plaintiff's life expectancy by injury, independent of the economic loss sustained as a result of such curtailment, is a separate and distinct item of the recoverable damages.

COUNTER-STATEMENT OF THE CASE.

The Petitioner's statement of the case, in material part, essentially is correct except for the reference to the testimony of plaintiff's doctor. The substance of the plaintiff's doctor's testimony is given by the trial judge and the Court of Appeals (3a, Pet. App. A and 11a, App. B, Pet.).

This testimony is to the effect that at the time of the occurrence, November 5, 1958, the plaintiff, 52 years of age, had a normal life expectancy of approximately 18 years, and that the myocardial infarction, totally unrelated to any negligence of the defendant, reduced the plaintiff's normal expectancy to 70% thereof, or 12.6 years. The testimony of the doctor was that this reduced expectancy of 12.6 years was further reduced by the negligence of the plaintiff, which occurred on November 5, 1958, *to* between 2.5 years to 3.8 years. In other words, the plaintiff would not live longer than the year 1962. The trial of the case concluded on November 14, 1963, and the plaintiff is still living, which shows that his life expectancy has not been shortened by approximately 8 years as estimated by his doctor.

The interpretation of the testimony concerning the plaintiff's shortened life expectancy was made by the Petitioner in Footnote 1 (page 3 of the Petition) is not supported by the evidence which has not been included in the certified record.

REASONS FOR DENYING THE WRIT.

I. Certiorari Should Not Be Granted to Review the Decision of the Court of Appeals Which Ordered a New Trial on Damages.

The Court of Appeals reversed the judgment of the District Court for the reason that the trial judge did not adequately or correctly instruct the jury as to what consideration should be given to the claim of diminution of life expectancy and its relation to other factors which the jury might consider in arriving at a fair and just award. (15a App. B, Pet.)

The Court of Appeals has found that the curtailment of life expectancy, standing alone, should not be the subject of a separate award of damages, but may be considered by the jury, under proper instructions, in making a fair and just award for the total damages sustained.

Until a new trial is had and final judgment is entered, we respectfully submit that the case is not an appropriate one for consideration by this Court at this time on a Petition for Certiorari.

II. The Court of Appeals Was Correct in Its Decision That a Prospective Diminution of Life Expectancy Is Not, per se, a Compensable Element of Damages.

1. *In An Action Under The Jones Act The Plaintiff's Right Of Recovery And The Amount Thereof Are To Be Determined Solely By Federal Law.*

The right of action was created by Federal Employers' Liability Act, (hereinafter referred to as FELA), 45 U. S. C. A. 51, which was incorporated into the Jones Act, 46 U. S. C. A. 688.

The latter named statute, in material part, provides:

> Any seaman who shall suffer injury . . . may maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; . . .

The right of action thus created was a federal right and is administered and protected by federal decisions.

In *Chesapeake & Ohio Rwy. Co. v. Kelly,* 241 U. S. 485, 491, the Court said:

> But the question of the proper measure of damages is inseparably connected with the right of action, and in cases arising under the Federal Employers' Liability Act it must be settled according to general principles of law as administered in the Federal courts.

In *Bailey v. Central Vermont Ry.,* 319 U. S. 350, 353, this Court again reiterated that the federal rules only are to be applied. Thus:

> The rights which the Act creates are federal rights protected by federal rather than local rules of law. *Second Employers' Liability Cases,* 223 U. S. 1; *Seaboard Air Line Ry. v. Horton,* 233 U. S. 492; *Chesapeake & Ohio Ry. Co. v. Kuhn,* 484 U. S. 44. And those federal rules have been largely fashioned from the common law (*Seaboard Air Line Ry. v. Horton, supra*) except as Congress has written into the Act different standards. *Tiller v. Atlantic Coast Line R. Co.,* 318 U. S. 54.

See also *Ellis v. Union Pacific R. Co.,* 329 U. S. 649, 653.

In Louisiana & Arkansas Ry. Co. v. Pratt, 142 F. 2d 847, the Court considered whether interest should be allowed from the date of demand or from the date of the judgment.

The Court rejected the state statute and applied the common law. The Court said (p. 848):

> "In all actions for personal injury brought under the Federal Employers' Liability Act, the remedy given by that statute is exclusive, and all state laws are superseded in so far as they attempt to cover the same field.[3] At the time the Act was enacted, interest was not allowable on claims for personal injuries until the amount of damages had been judicially ascertained. This was upon the theory that no debt was due prior thereto or that interest was a part of the damages and was merged therewith in the amount awarded.[4]
>
> "The Act itself contains no provision with respect to interest, and the measure of damages in actions under it, being inseparably connected with the right of action created, must be settled according to general principles of law as administered in the federal courts at the time of enactment,[5] except as modified by Erie Railroad Company v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487.
>
> "The item of accrued interest presents a question of substantive law."[6] [Footnotes omitted.]

Aside from strictly procedural matters, state laws and decisions are not to be considered in determining the extent of the plaintiff's right under the Jones Act.

In *Dice v. Akron C. & Y. R. Co.*, 342 U. S. 359, 361, the Court said:

> "*First.* We agree with the Court of Appeals of Summit County, Ohio, and the dissenting judge in the Ohio Supreme Court and hold that validity of releases under the Federal Employers' Liability Act raises a federal question to be determined by federal rather than state law. Congress in § 1 of the Act granted petitioner a right to recover against his employer for damages negligently inflicted. *State laws are not controlling in*

> *determining what the incidents of this federal right shall be. Chesapeake & Ohio R. Co. v. Kuhn,* 284 U. S. 44; *Ricketts v. Pennsylvania R. Co.,* 153 F. 2d 757, 759. Manifestly the federal rights affording relief to injured railroad employees under a federally declared standard could be defeated if states were permitted to have the final say as to what defenses could and could not be properly interposed to suits under the Act. *Moreover,* only if federal law controls can the federal *Act be given that uniform application throughout the country essential to effectuate its purposes.* See *Garrett v. Moore-McCormack Co.,* 317 U. S. 239, 244, and cases there cited." [Emphasis supplied.]

This Court has been consistent in holding that neither lower federal courts nor state courts shall construe the Act so as to deprive claimants the rights which it conferred. See *Ferguson v. Moore-McCormack Lines,* 352 U. S. 521; *Rogers v. Missouri Pacific R. R. Co.,* 352 U. S. 500.

In *Dow v. Carnegie-Illinois Steel Corp.,* 165 F. 2d 777 (3 C. A.), a Jones Act case, it was held that in proceedings under FELA, rights and obligations of the parties depend on the Act and applicable principles of common law. "It follows, therefore, that the measure of damages is as indicated by the Act and by the federal law" (p. 779).

From the foregoing authorities, it is clear that not only the right of action but the damages in a Jones Act case are to be measured by "federal law," which brings us to a consideration of what the federal rule is with regard to compensation for shortening of life expectancy as a separate and distinct element of damages.

2. *It Has Not Been Established as a Rule of Federal Law That Shortening of Life Expectancy Alone Is a Recoverable Element of Damages.*

We have found no FELA case or Jones Act case where any federal court has held that shortening of life expectancy is a separate and distinct item of damage.

This question was considered in *Farrington v. Stoddard,* 115 F. 2d (1 C. A. 1940). That was a personal injury case occurring on land, *and jurisdiction was founded on diversity of citizenship.* The federal court was therefore applying Maine law in a death action. It held that the plaintiff could not recover for the shortening of the decedent's life expectancy under a survival statute. This case has been the subject of annotation in 131 A. L. R. 1344.

Under FELA, the estate of a decedent cannot recover the economic value of his life. *Hickman v. Taylor,* 170 F. 2d 327, 329 (C. A. 3 1948).

The other federal case in which this question was raised is that of *O'Leary v. United States Lines Company,* 111 F. Supp. 745 (D. C. Mass. 1953). This was an action for damages for personal injuries sustained by a stevedore, and again jurisdiction was based on *diversity of citizenship,* and the Court applied Massachusetts law.

The Court denied an application to amend the Complaint to claim general damages, including "a material diminution of his normal life expectancy." The Court denied the amendment, holding that no Massachusetts case had allowed such a claim "*except in so far as the decedent feared such loss and that anxiety aggravated (and thus could be embraced within) conscious pain and suffering.* Choicener v. Walters Amusement Agency, Inc., 269 Mass. 341, 343, 168 N. E. 918." (Italics supplied.)

In that case the Court also held that there was no indication that the Massachusetts Court would adopt the English rule which would allow a decedent's representative to recover damages for loss of "a predominantly happy life," as set forth in *Benham v. Gambling,* (1941) A. C. 157, 166, 1 All. E. R. 7, 12.

We have been unable to find any other federal cases where this question has been fully considered.

The plaintiff refers to *Sox v. United States,* 187 F. Supp. 465 (So. Car. 1960). While the court in that case mentions "deprivation of normal life expectancy" as one

of three elements of damages, careful reading of the opinion does not disclose that any amount for it was included in the award of general damages which followed a discussion of the scope of the first two items of (a) impairment of body and mind and (b) cost of care made necessary by total disability.

This case arose in South Carolina and was prosecuted under the Tort Claims Act, 28 U. S. C. A. 1346, which provides for liability "in accordance with the law of the place where the act or omission occurred." It would therefore appear that the court was concerned with state rather than federal law.

There have been a number of decisions in various state courts where it has been held that the shortening of life expectancy is not a compensable separate item of damages.

In view of the policy of the Supreme Court to see that federal law is uniformly applied to FELA cases, state court decisions are not controlling, but we shall nevertheless refer to them.

3. *State Court Decisions Do Not Allow Damages for Shortening of Life Expectancy.*

One of the earliest American decisions dealing with this question is that of *Richmond Gas Co. v. Baker,* 146 Ind. 600; 45 N. E. 1049 (1897). In that case, the Court said (p. 609):

> "None of the cases cited by appellee, as we believe, sustain the contention of counsel. In general, these cases reach to this, that in an action for injury by the wrong of another the actual condition of the injured person as caused by the accident may be considered for the purpose of determining the amount of damages, present and prospective, which should be awarded. *And if the condition of the injured person is such that a shortening of life may be apprehended, this may be considered in determining the extent of the injury, the consequent disability to make a living and the bodily and mental suffering which will result.* This, however, falls

short of authorizing damages for the loss or shortening of life itself. The value of human life cannot, as adjudged by the common law, be measured in money. It is, besides, inconceivable that one could thus be compensated for the loss or shortening of his own life." (Italics supplied.)

The Indiana courts have consistently followed this decision. See *Cleveland, C. C. & St. L. R. Co. v. Miller,* (1905) 165 Ind. 381, 74 N. E. 509; *Muncie Pulp Co. v. Hacker,* (1906) 37 Ind. App. 194, 76 N. E. 770; *Lake Erie & W. R. Co. v. Johnson,* (1922) 191 Ind. 479, 133 N. E. 732.

Other American cases to the same effect are: *Krakowski v. Aurora, E. & C. R. Co.,* (1912) 167 Ill. App. 469; *Ham v. Maine-New Hampshire Interstate Bridge Authority,* 92 N. H. 268, 30 A. 2d 1 (1943); *Rohlfing v. Moses Akiona Ltd.,* 369 P. 2d 96 (Sup. Ct. Hawaii 1961); *Rhone v. Fisher,* 224 Md. 223; 167 A. 2d 773 (Md. Ct. App. 1961). See also 97 A. L. R., p. 823.

A rather exhaustive article on this subject "Psychic Interest in One's Own Life," by Hubert Winston Smith, appears in U. of Pa. Law Review, Vol. 98, No. 6, May 1950.

It is clear from these American decisions—and we have found none to the contrary—that loss of life expectancy is not regarded as a separate and distinct item of damage.

4. *The Recent English Decisions Are Not Part of Federal Law, and the Very Unsatisfactory Rule of Flint v. Lovell Should Not Be Adopted.*

Apparently the leading case on this subject is *Flint v. Lovell,* 1 K. B. 354 (1935). As we read that decision, it, in effect, overrules their early British case of *Baker v. Bolton,* 1 Camp. 493 (1808), in which it was said that the death of a human being could not be complained of as an injury. It appears that the judges in that case reviewed the historical origin of this decision and what they considered to be modifications thereof. However, it does appear that as late as

1917 in the *SS Amerika*, 1917 A. C. 38, some British Courts considered it to be in effect. In that case it was said, "It is far too late for this House to disturb the rule expressed by Lord Ellenborough in Baker v. Bolton," 97 A. L. R. 819.

Nevertheless, *Flint v. Lovell*, in 1935 held that this item of damage could be compensated for.

It is therefore by no means clear that when the FELA was enacted in 1908, the common law of England clearly established the rule that diminution of life expectancy was a separate item of damage.

The case of *Flint v. Lovell* was followed by *Rose v. Ford*, A. C. 826 (1937), and by the case of *Benham v. Gambling*, (1941). A. C. 157, 166, 1 All. E. R. 7, 12. These cases are rather fully discussed in A. L. R. 1351 *et seq.* The reading of those decisions will show that there were some misgivings, particularly by Roche, L. J., in *Flint v. Lovell*, A. L. R. 821, concerning the measure of damages for this item, and the danger of giving "plaintiff compensation for the same thing more than once under the various heads of damage".

It is interesting to note that in the *Gambling* case, four years later, on appeal, the House of Lords reduced a finding from £1200 to £200, showing that the British courts are concerned with the adequacy of proof of this item of damage.

In *Rhone v. Fisher*, 224 Md. 223; 167 A 2d 773, Chief Judge Brune of Maryland reviewed the English cases above referred to and refused to accept the British rule. He refers at length to the opinion of Viscount Simon, in *Benham v. Gambling*, which points out the difficulties which have been experienced in the British courts. He concluded:

> "We recognize that there is some persuasiveness in the contention that the shortening of one's life by the negligent act of another should give the victim a right of recovery against the wrongdoer for that element of damage. The experience of the English courts with a rule permitting such recovery as a separate element of damages, as evidenced by Benham v. Gambling, supra,

shows the extreme difficulty of stating or developing any satisfactory rule for the measurement of damages for such a wrong, and appears to have resulted in the rule being relegated to a matter of form, rather than substance, with a maximum allowance therefor in practice of about $1,400.

"The experience of the English courts with the rule and the virtual emasculation thereof which has evolved from that experience, as well as the rather ephemeral considerations which must be taken into account under it, and also the possible duplication or overlapping of compensation under this and other heads of damages (a possibility which Roche, L. J. thought had become in large part an actuality in Flint v. Lovell, supra) do not commend the English rule to us as one for adoption in this State." [Footnotes omitted.] (p. 777, 167 A. 2d.)

It is apparent that since the decision of *Flint v. Lovell,* the British appellate courts have sought to overcome the dangers in accepting this rule by policing and reducing awards for this particular item of damage with the practical result that a nominal sum is now looked upon as being appropriate.

Since *Benham v. Gambling, supra,* we have not found any English cases where more than £500 has been awarded for this item of damage. In the *Aizkir Mendi,* 3 All Eng. L. R. A. 483, cited by the petitioner, the Court made awards in three different age groups, awarding respectively £300, £350 and £400, the higher awards being in favor of the younger age groups. In that case the Court considered the fact that seamen, because of the hazardous nature of their calling, would likely have shorter life expectancies. This decision seems not to follow the language of Viscount Simon in the *Gambling* case, who said: "In any case the thing to be valued is not the prospect of length of days, but the prospect of a predominately happy life."

It, therefore, appears that there is lack of uniformity or understanding in England of the decision of the *Gambling* case and its application.

In "The Quantum of Damages," Kemp and Kemp, Vol. I, 2 Ed., 1961, pp. 58-67, there is a discussion of the English decisions and a table of awards in a number of cases, which vary in amount from £150 to £500.

It seems clear that the established English rule now is that a lower measurement of damages for this cause of action has been set by reason of these damages being "in fact incapable of being measured in coin of the realm with any approach to real accuracy" (per Viscount Simon, in *Gambling*).

The petitioner on page 8 of his brief refers to Munkman, "Damage for Personal Injury and Death," 71-78 (1956). In his second edition (1960), after discussing the leading cases, he says (p. 90-91):

> "More commonly, a living plaintiff has sustained severe injuries which in themselves entail a shortening of life. Thus, shortening of life is only one element in the damages, and probably the best method in these cases is not to assess it as a separate item at all."

From the foregoing it is clear that the English courts regard this very speculative item of damages as being one which has now been controlled as to amount by the courts. In view of the doubt as to the extent of the power of a federal court in a FELA or Jones Act case to reduce a jury's verdict, the English rule as to the amount of damages cannot be effectively followed in our courts and should not be adopted.

5. *The Court of Appeals Was Correct in Holding That the Shortening of Life Expectancy Should Not Be Considered Separately as an Item of Damages.*

The Court of Appeals concluded that it was not feasible to consider shortening of life expectancy, *per se*, as a separate compensable element of damages because of the

"incalculable variables which may enter into an attempt to place a value on life; absent some workable criteria, a damage award would be base speculation." (3a, App. B, Pet.)

The years for which damages are claimed represent the terminal years of life which may not necessarily be happy or pleasurable. They may be fraught with extreme pain and suffering, insanity, natural deterioration by reason of age, and total inability to indulge in any physical activity. These conditions may be brought about by many intervening circumstances totally unconnected with the previous injury complained of, or, in fact, in the absence of any injury. Therefore, the plaintiff's death might occur much sooner than his estimated life expectancy, without the injury.

In this case the jury was properly charged and presumably awarded damages for diminution of earning power for such part of his reduced life expectancy of 12.6 years as he would have worked; damages for pain and suffering and mental anxiety in the future during that expectancy in life; and damages for that same expectancy for the loss of life's pleasures, which comprehend the normal activity and whatever enjoyment life might hold for him.

As pointed out by the Court of Appeals, these are the elements of damages normally involved in tort actions.

To award a separate sum on the theory that he would not live but 4 of the 12.6 years' expectancy would clearly be duplicating damages.

The facts in this case demonstrate the inability to determine with any degree of accuracy the span of life, as the plaintiff has now lived nearly 4 years beyond the time when his physician testified he would live. In this view, if the jury's award of $25,000 were sustained, the plaintiff would be recompensed for damages which he has not, in fact, suffered.

The Court of Appeals was correct in holding that the prospective shortening of life is but another element of damages to be considered in connection with economic losses,

pain and suffering, and loss of life's pleasures, under proper instructions.

III. Conclusion.

For the foregoing reason the Petition for Writ of Certiorari should be denied.

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